Supreme Court, U.S.
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No. 99-___

In The

Supreme Court of the United States

ALI MOGHADAM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can Congress by-pass the Copyright Clause and create copyright protections under the Commerce Clause that it could not create under the Copyright Clause?

PARTIES TO THE PROCEEDING

In addition to Petitioner Ali Moghadam, the only other party in the Eleventh Circuit Court of Appeals was Respondent, appellee below, United States of America.

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PETITION FOR WRIT OF CERTIORARI

Ali Moghadam, the petitioner in the above-captioned case, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered on May 19, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on May 19, 1999 and captioned as *United States v. Ali Moghadam* (11th Circuit number 97-2180). The opinion was published as *United States v. Ali Moghadam*, 175 F.3d 1269 (11th Cir. 1999). A copy of that opinion appears herein as Appendix "A." A timely petition for rehearing with suggestion for rehearing *en banc* was filed in the Eleventh Circuit on June 7, 1999. That petition was denied on August 27, 1999. A copy of the order denying the petition for rehearing with suggestion for rehearing *en banc* appears herein as Appendix B.

JURISDICTION

The federal district court had jurisdiction over Petitioner's case pursuant to 18 U.S.C. section 3231. The Eleventh Circuit Court of Appeals had jurisdiction over an appeal from a final judgment of a district court under 28 U.S.C. section 1291. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Constitution, Article I, Section 8, clause 3, Commerce Clause: Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

2. U.S. Constitution, Article I, Section 8, clause 8, Copyright Clause: Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

3. 18 U.S.C. section 2319A:

Whoever, without the consent of the performer or performers involved, knowingly and for the purpose of commercial advantage or private financial gain –

> (1) fixes the sound or sounds or images of a live musical performance in a copy of phonocard, or reproduces copies of phonocards of such a performance from an unauthorized fixation;
>
> (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance; or
>
> (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonocard fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States;

shall be imprisoned for not more than 5 years. . . .

STATEMENT OF THE CASE AND FACTS

A. Procedural History

An indictment was returned in the Middle District of Florida on March 27, 1997, charging Petitioner Ali Moghadam, hereafter just Moghadam, and twelve others with various offenses connected to the sale of "bootleg" recordings. Moghadam was named only in Count Seven and he alone was charged with that Count. Count Seven of the indictment alleged that Moghadam violated 18 U.S.C. section 2319A by distributing and selling compact discs fixed with the sounds of live performances without the consent of the performers. On May 9, 1997, a superseding indictment was returned. The only change made in the superseding indictment was to alter the number of the count alleged against Moghadam from Count Seven to Count Four.

On May 30, 1997, Moghadam filed a motion to dismiss the indictment. Moghadam moved to dismiss the indictment on the basis that 18 U.S.C. section 2319A was unconstitutional. On June 12, 1997, the government filed written opposition to Moghadam's motion to dismiss. On July 9, 1997, the district court rubber stamped "denied" on Moghadam's motion to dismiss the indictment. The court did not otherwise issue an order or opinion concerning Moghadam's motion to dismiss the indictment.

On August 11, 1997, Moghadam plead guilty to Count Four. Moghadam expressly reserved the right to appeal the district court's denial of his motion to dismiss the indictment on the ground that 18 U.S.C. section 2319A was unconstitutional.

A sentencing hearing was held on November 19, 1997. The district court imposed a sentence of two years probation and an $8,000 fine. Moghadam's notice of appeal was also filed on November 19, 1997.

On May 19, 1999, the Eleventh Circuit issued its published opinion. In that opinion the Court of Appeals ruled that 18 U.S.C. section 2319A was not unconstitutional. Moghadam filed a timely petition for rehearing with suggestion for rehearing *en banc* in the Eleventh Circuit on June 7, 1999. That petition for rehearing with suggestion for rehearing *en banc* was denied on August 27, 1999.

B. Statement Of The Facts

Count Four of the superseding indictment alleged that Moghadam violated 18 U.S.C. section 2319A by knowingly distributing, selling, or trafficking in compact discs fixed with the sounds and images of live performances without the consent of the performers.[1] At the

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[1] The term "fixed" is defined in 17 U.S.C. section 101 as follows: "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." A live performance, that is not yet

plea hearing, the government indicated that at a trial it would have produced recordings of telephone conversations between a Thomas Chang and Moghadam "in which they agreed to have Mr. Moghadam ship these digital audio tapes containing unauthorized fixations of the Beastie Boys and Tori Amos to Mr. Chang, for Mr. Chang to copy them in exact disk format, return them to Mr. Moghadam for his sale."

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to determine the limits of Congressional power. Or, can Congress by-pass the Copyright Clause and use its authority under the Commerce Clause to create copyright protections which it cannot create pursuant to the Copyright Clause?

A. Introduction

The legal issue raised by Moghadam in this proceeding is whether 18 U.S.C. section 2319A is constitutional. To resolve that issue, however, the Court must address a fundamental constitutional question that has never been addressed or answered by this Court. All parties concede that section 2319A creates copyright protections and that those protections cannot pass constitutional muster under the Copyright Clause. The government and the Eleventh Circuit Court of Appeals have taken the position in this case that Congress can by-pass the Copyright Clause and

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taped or otherwise captured in a "tangible medium" is "unfixed."

create these copyright protections by way of its authority under the Commerce Clause. Moghadam has argued that Congress cannot by-pass the specifically enumerated grant of authority contained in Article I, Section 8, clause 8, the Copyright Clause, to create copyright protections under the Commerce Clause. The position of the Eleventh Circuit and the government, if allowed to stand, opens the door for Congress to legislate all copyright protections by way of the Commerce Clause and thus render the Copyright Clause, and potentially every other limited grant of authority contained in Article I, Section 8, superfluous. This Court must grant certiorari in this case and answer this question by setting precise limitations on Congressional authority. This Court should clearly indicate that Congress cannot by-pass express Constitutional limitations on its legislative authority set forth in the various clause of Article I, section 8, to create rights and obligations by way of its expansive power under the Commerce Clause.

B. The Genesis Of The Question

1. The Statute: 18 U.S.C. section 2319A

18 U.S.C. section 2319A states:

> Whoever, without the consent of the performer or performers involved, knowingly and for the purpose of commercial advantage or private financial gain –
>
> (1) fixes the sound or sounds or images of a live musical performance in a copy of phonocard, or reproduces copies of phonocards of

> such a performance from an unauthorized fixation;
>
> (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance; or
>
> (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonocard fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States;
>
> shall be imprisoned for not more than 5 years. . . .

There is virtually no Congressional history for this statute.[2] On December 8, 1994, Congress enacted the Uruguay Round Agreements Act (URRA). Pub. L. No. 103-465, 108 Stat. 4809, 4973 (1994). The URRA was rushed through a largely lame-duck Congress on "fast-track procedures" and signed by the President the same day. The URRA was derived from the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). GATT is an international arrangement under which nearly eighty countries have negotiated common norms for international trade.

Contained in the URRA was the Agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPs. 18 U.S.C. section 2319A was part of the TRIPs. A companion civil section, almost identical to section 2319A, was

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[2] See e.g. Nimmer, *The End of Copyright*, 48 Vand. L. Rev. 1385, 1409 (1995): "One seeks in vain for evidence that anyone in Washington even considered the constitutional basis for these vitally important amendments to United States copyright law."

also added to U.S.C. Title 17, Copyrights, by TRIPs. These provisions together made up the "anti-bootlegging" sections of the URRA. Concerning these provisions, Representative Hughes of New Jersey stated generally: "There are a number of changes *in copyright* that will advance our interests in the area of bootlegging, which is going to basically protect our country." See 140 Cong. Rec. H1141, H11457 (Nov. 29, 1994) (emphasis added).

2. A Constitution Source For Section 2319A?

a. The Copyright Clause

Since *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) it has been fundamental constitutional law that a Congressional enactment is constitutional only if derived from one of the enumerated grants of legislative authority set forth in the Constitution. The Copyright Clause of the Constitution, set forth in Article I, section 8, is such an enumerated grant of legislative authority to Congress. By that Clause, Congress is empowered "to promote the Progress of Science and the Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Respective Writings And Discoveries." U.S. Const. art. I, section 8, cl. 8.

In the district court and in the Court of Appeals, Moghadam argued that section 2319A was unconstitutional. In particular, Moghadam argued that section 2319A could not be based upon Congress' grant of authority under the Copyright Clause. In the Court of Appeals, the government agreed that section 2319A could not be sustained pursuant to Congress' authority under the Copyright Clause. Similarly, the Eleventh Circuit

assumed *arguendo* that section 2319A could not be sustained under the Copyright Clause. The Court of Appeals noted, as both Moghadam and the government had pointed out, that section 2319A expressly applied to "unfixed" performances. The Copyright Clause can only create rights in "Writings and Discoveries." The opinions of this Court have uniformly held that the term "Writings," as used in the Copyright Clause, cannot apply to unfixed, live performances. See *Goldstein v. California*, 412 U.S. 546, 561 (1973): "Writing" must be a "physical rendering." See also *United States v. Moghadam, supra*, 175 F.3d at 1273-1274, quoting Nimmer, *The End of Copyright, supra*, 48 Vand. L. Rev. at 1409: "No respectable interpretation of the word 'writings' embraces an untaped performance of someone singing at Carnegie Hall." Thus, there is uniform agreement that section 2319A cannot be sustained by way of Congress' grant of authority under the Copyright Clause.

b. The Commerce Clause

In the Court of Appeals, while recognizing that Congress never cited the Commerce Clause as a source of authority, the government argued that section 2319A could be sustained under the Commerce Clause even if it could not be under the Commerce Clause. This Court has held that the Commerce Clause empowers Congress to legislate activities that substantially affect interstate commerce. A Congressional act will be upheld as constitutional if a rational basis exists for concluding that the activity which is the subject of the act sufficiently affected interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-559 (1995). For purposes of this proceeding,

Moghadam does not dispute, as the Eleventh Circuit found, that section 2319A "has sufficient connection to interstate and foreign commerce to meet the *Lopez* test." *United States v. Moghadam, supra,* 175 F.3d at 1277. Thus, the Eleventh Circuit found that section 2319A might be upheld as a proper use of Congress' legislative authority under the Commerce Clause pursuant to the standards set forth in *Lopez*. *United States v. Moghadam, supra,* 175 F.3d at 1277.

C. The Question: Can Congress Create Copyright Protections By Way Of The Commerce Clause That It Cannot Create By Way Of The Copyright Clause?

As the Eleventh Circuit noted, finding that section 2319A meets the *Lopez* standard does not resolve the crucial constitutional question. "The more difficult question in this case is whether Congress can use its Commerce Clause power to avoid the limitations that might prevent it from passing the same legislation under the Copyright Clause." *United States v. Moghadam, supra,* 175 F.3d at 1277. Or to put the question in more general terms, can Congress use the expansive powers of the Commerce Clause to circumvent the limited grants of authority set forth in the remaining clauses of Article I, section 8? And, if Congress can so circumvent those limited grants of power, have not the remaining clauses of Article I, section 8 been rendered superfluous? Justice Thomas has already anticipated this question and answered it with a resounding no, rejecting the position

taken by the Eleventh Circuit in this case. In his concurring opinion in *United States v. Lopez, supra,* 514 U.S. at 585, Justice Thomas stated:

> In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence . . . But on this Court's understanding of congressional power (under the Commerce Clause) many of Congress' other enumerated powers under Art. I, section 8, are wholly superfluous. After all if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy law, cl. 4, or coining money or fix the standard of weights or measures, cl. 5 . . . An interpretation of cl. 3 (the Commerce Clause) . . . that makes the rest of Section 8 superfluous simply cannot be correct.

Justice Thomas would have added, had he been reviewing this case, if Congress can create copyright protections under the Commerce Clause, there is no need for a Copyright Clause because *all* copyright law "substantially affects" interstate commerce. *Mazer v. Stein,* 347 U.S. 201, 219 (1953).

1. The Eleventh Circuit's Incorrect Answer To The Question

As noted above, Justice Thomas has already determined that Congress cannot use the Commerce Clause in

such a way as to render the remaining grants of legislative authority in Article I, Section 8 superfluous. However, that is exactly what the Eleventh Circuit did in this case.

The Eleventh Circuit addressed the constitutional question presented by first noting the apparent "tension" between two cases. *United States v. Moghadam, supra,* 175 F.3d at 1279.

One the one hand, the Court of Appeals found that *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964) stood for the proposition that "as a general matter, the fact that legislation reaches beyond the limits of one grant of legislative power has no bearing on whether it can be sustained under another." *United States v. Moghadam, supra,* 175 F.3d at 1277. Thus, under this reasoning, whether section 2319A violated the Copyright Clause would be irrelevant if it passed muster under the Commerce Clause.[3]

On the other hand, the Court of Appeals recognized that *Railway Labor Executives' Ass'n v. Gibbons,* 455 U.S. 457 (1982) held that "some grants of legislative authority in Article I, section 8 contain significant limitations that

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[3] Moghadam contends that the Court of Appeal simply misunderstood *Heart of Atlanta Motel.* The question presented here is not whether the source of authority expressly cited by Congress is sufficient, the situation presented in *Heart of Atlanta Motel,* but whether, when the source of authority expressly cited by Congress is clearly not sufficient, may the statute nevertheless be found constitutional on a basis never considered by Congress. *Heart of Atlanta Motel* never remotely addressed this question.

can be said to represent the Framers' judgment that Congress should be affirmatively prohibited from passing certain types of legislation, no matter under which provision." *United States v. Moghadam, supra,* 175 F.3d at 1279. Under *Railway Labor Executives,* Congress would not be able to circumvent the limitations inherent in the term "Writings" in the Copyright Clause by passing a statute under the Commerce Clause which created copyright protection for works that are not "Writings."

The Eleventh Circuit resolved this "tension" by holding that:

> We hold that the Copyright Clause does not envision that Congress is positively forbidden from extending copyright-like protection under other constitutional clauses, such as the Commerce Clause, to works of authorship that may not meet the fixation requirement inherent in the term "Writings." The grant itself is stated in positive terms, and does not imply any negative pregnant that suggests that the term "Writings" operates as a ceiling on Congress' ability to legislate pursuant to other grants.

United States v. Moghadam, supra, 175 F.3d at 1280.

In other words, the Eleventh Circuit concluded, while some grants of legislative authority in Article I, section 8 contain significant limitations that can be said to represent the Framer's judgment that Congress should be affirmatively prohibited from passing certain types of legislation, no matter under which provision, *Railway Labor Executives' Ass'n v. Gibbons,* the Copyright Clause, and more particularly the fixation requirement inherent in "Writings," is not one of them. This is so, the Eleventh

Circuit reasoned, because the grant of power enumerated in the Copyright Clause is "positive" and does not imply any "negative" that operates as a "ceiling" on Congress.

2. Certiorari Should Be Granted So That This Court Can Properly Resolve The Constitutional Question Incorrectly Resolved By The Eleventh Circuit

The Eleventh Circuit cited no authority for its novel proposition that the Copyright Clause was solely a "positive" grant of power which contained no "ceiling" on Congress' ability to legislate "pursuant to other grants." More importantly, the Court of Appeals was wrong. Its opinion flies in the face of the conclusion reached by every commentator who has addressed the issue. The opinion of the Court of Appeals opens a constitutional door which no court has ever dared to open and through which Congress may simply disregard the limited grants of legislative power bestowed upon it by the Constitution.

3. The Copyright Clause Is A Limited Grant Of Authority That Congress Cannot Simply By-pass

It is beyond question that the "powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." *City of Boerne v. P.F. Flores*, 521 U.S. 507, 516 (1997) quoting *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). Every commentator which has addressed the issue has found that the term "Writings" in the Copyright

Clause is a limitation that Congress cannot go beyond. See e.g. Heald, *The Vices of Originality,* 1991 Sup. Ct. Rev. 143, 169, 173 (1991): "This interpretation suggests that section 8 of Article I does more than grant Congress a laundry list of powers – it also places substantive limitations on Congress . . . The history of the Intellectual Property Clause sheds additional light on the propriety of the Court's insistence that it functions as not only a grant of power but a strong substantive limitation." See also Nimmer, *The End of Copyright, supra,* 48 Vander. L. Rev. at 1411-1412: "The affirmative grant of limited powers to Congress via the Copyright Clause is irrelevant" if Congress grants protections to creations that are not "writings" under the Commerce Clause; Cohen, *Copyright and The Jurisprudence of Self-Help,* 13 Berkeley Tech. L. J. 1089, 1132 (1998): "Thus, Congress may not invoke the commerce power to do what the Intellectual Property Clause bars it from doing; granting 'exclusive rights' in unpatentable or uncopyrightable subject matter;" Pollack, *Unconstitutional Incontestability; The Intersection of Intellectual Property and Commerce Clauses of the Constitution; Beyond a Critique of Shakespeare Co. v. Silstar Corp.,* 18 Seattle U. L. Rev. 259, 279 (1995): " . . . the Intellectual Property Clause (is) an especially clear instance of the Constitution's repeated enumeration of specific powers for the purpose of limiting those powers." One commentator, William Patry, directly addressed the precise question raised here. "When Congress is barred from legislating under the Copyright Clause . . . the question arises whether Congress may grant the same or similar protection through its Commerce Clause power." Patry, *The Enumerated Powers Doctrine and Intellectual Property:*

An Imminent Constitutional Collision, 67 Geo. Wash. L. Rev. 359, 367 (1999). Patry answered the question bluntly: "When a specific clause of the Constitution, such as Clause 8 of Article I, Section 8, has been construed as containing general limitations on Congress' power, Congress may not avoid those limitations by legislating under another clause." *Id.*, at 362.

These commentators, particularly Patry, find support for their view of a limited Copyright Clause which cannot be by-passed by Congress in two recent unanimous opinions of this Court, both written by Justice O'Connor. In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) and *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340 (1991) this Court clearly demarcated the boundaries of Congress' power in two ways.

First, the Court held that the "primary objective of copyright is not to reward the labor of authors, but to promote the Progress of Science and the useful Arts." *Feist Publications, Inc. v. Rual Telephone Service Company, Inc., supra*, 499 U.S. at 349. The Eleventh Circuit adopted the contrary view. It held that Science and the Useful Arts were promoted by "securing some exclusive rights to the creative author." *United States v. Moghadam, supra*, 175 F.3d at 1280. In short, the Eleventh Circuit's opinion is based upon a view of the Copyright Clause which places emphasis on the rights of the author, which are essentially commercial rights, not on the non-commercial benefit to the public from the promotion of the Sciences. A review of the reasoning adopted by the Eleventh Circuit lead Nimmer to opine that permitting Congress to by-

pass the Copyright Clause when creating copyright protections would mean that "two centuries of rooting copyright enactments in the Copyright Clause now appears, from the present perspective, to have been simply a phase. It is difficult indeed to discern any limits here. If unfixed works (e.g. live musical performances which are not 'Writings') can be protected perpetually with something akin to copyright, then what conceivable implementation lies beyond Congress' powers. The affirmative grant of limited powers to Congress via the Copyright Clause is irrelevant because vastly greater affirmative powers have been arrogated under the commerce technique." Nimmer, *The End of Copyright, supra,* at 1411-1412. In short, by finding that the "essence" of the Copyright Clause is the benefit the public derives from works that promote Science, this Court established a limit on the scope of Congress' authority. Pursuant to the Copyright Clause, Congress can create copyright protections that promote Science. It cannot by-pass the Copyright Clause and create copyright protections whose essence is to "reward the labor of authors" and affect interstate commerce.

Secondly, also contrary to the opinion of the Eleventh Circuit, this Court has found a "negative pregnant" in the Copyright Clause. When the Court ruled in *Feist* that compilations of facts that do not feature an "original selection or arrangement" were not entitled to protection under the Copyright Clause, it recognized a negative right, the public's right to copy such unprotected material. *Feist Publications, Inc. v. Rural Telephone Service Company, Inc., supra,* 499 U.S. at 350-351; see also Patry, *The Enumerated Powers Doctrine And Intellectual Property: An*

Imminent Constitutional Collison, supra, 67 Geo. Wash. L. Rev. at 367-368: "Congress' inability to provide copyright-like protection for unoriginal material is not only the result of a specific limitation on its enumerated power when legislating under Article I, Section 8, Clause 8; it is also the result of a general constitutional right of the public to copy such material – a type of Tenth Amendment public domain for intellectual property." Thus, it follows from *Feist,* Congress cannot by-pass the limitations of the Copyright Clause to create copyright protections that nullify any such "negative rights" created by the limitations of the Copyright Clause itself.

Clearly a split of authority exists. On the one hand, the Eleventh Circuit held in this case that Congress may simply by-pass the Copyright Clause and used its more expansive powers under the Commerce Clause to create copyright protections which affect commerce and are thus essentially commercial rights. On the other hand, the commentators are uniform in their belief that the Copyright Clause is a limited grant of authority that cannot simply be by-passed by Congress to create new copyright protections that clearly are beyond the scope of the Copyright Clause. The commentators' view is supported by this Court's general holding in *Railway Labor Executives' Association v. Gibbons* and its recent holding in *Bonito Boats, Inc.* and *Feist.* Certiorari should be granted in this case so that the Court can resolve this issue: can Congress by-pass a specific enumerated grant of power, such as its authority under the Copyright Clause, to create rights and obligations under the Commerce Clause that cannot be created under the Copyright Clause?

D. The Question, If Unanswered

The Eleventh Circuit's opinion in this case has opened the door for Congress to greatly expand its power. Whenever it wishes to create a right or obligation that it cannot otherwise create pursuant to one of the enumerated grants of authority set forth in Article I, Section 8, it will turn to the expansive power of the Commerce Clause to create that right or obligation. All it need do to create that right or obligation under the Commerce Clause, according to the Eleventh Circuit, is find some connection to interstate commerce. Once that step is taken, as Justice Thomas pointed out in *Lopez*, the rest of the enumerated powers in Article I, Section 8 become superfluous. Or, as Nimmer pointed out, "copyright now serves as an adjunct of trade." Nimmer, *The End of Copyright, supra*, 48 Vand. L. Rev. at 1412.

Left unchecked, such an expansion of Congressional power will destroy the structural integrity of the Constitution. No longer will the power of Congress be "defined and limited." *City of Boerne v. P.F. Flores, supra*, 521 U.S. at 516. Instead, the power of Congress will be defined solely by its ability to find an effect on interstate commerce by its acts. Bodies of law, such as patents and intellectual property, will cease to exist. All bodies of law derived from the enumerated grants of authority set forth in Article I, Section 8 will be, as Nimmer pointed out, "an adjunct of trade." The Copyright Clause, as well as every other clause in Article I, Section 8 except the Commerce Clause, will be rendered superfluous.

Such a grant of authority to Congress cannot stand. This Court must grant certiorari in this case to reverse the

ruling of the Eleventh Circuit and check any expansion of Congressional power inherent in the structure of the Constitution. This Court must grant certiorari and rule that Congress cannot by-pass the Copyright Clause and use its authority under the Commerce Clause to create copyright protections that undisputedly cannot be created under the Copyright Clause.

In this case, since all parties agree section 2319A cannot be sustained under the Copyright Clause, and, as argued above, it should not be sustained under the Commerce Clause, this Court should find that section 2319A exceeded the scope of Congress' authority and is thus unconstitutional.

CONCLUSION

For the foregoing reasons, the instant Petition for a Writ of Certiorari should be granted and this Court should find that 18 U.S.C. section 2319A is unconstitutional.

Dated: November 22, 1999

Respectfully submitted,

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UNITED STATES of America, Plaintiff-Appellee,

v.

Ali MOGHADAM, Defendant-Appellant.

No. 98-2180.

United States Court of Appeals,
Eleventh Circuit.

May 19, 1999.

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Appeal from the United States District Court for the Middle District of Florida.

Before ANDERSON, Chief Judge, HULL, Circuit Judge, and HAND*, Senior Circuit Judge.

ANDERSON, Chief Judge:

In 1994, Congress passed a statute criminalizing the unauthorized recording, the transmission to the public, and the sale or distribution of or traffic in unauthorized recordings of live musical performances. *See* 18 U.S.C. § 2319A. Appellant Ali Moghadam was convicted of violating that law (herein sometimes referred to as the "anti-bootlegging statute") after he pleaded guilty to knowingly distributing, selling, and trafficking in bootleg

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*Honorable William B. Hand, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

(unauthorized) compact discs featuring live musical performances by recording artists including Tori Amos and the Beastie Boys. The present appeal challenges the constitutional power of Congress to enact this legislation.[1] In the district court, Moghadam moved to dismiss the indictment, arguing that the statute was unconstitutional because it did not fall within any of the federal legislative powers enumerated in Article I, § 8 of the Constitution. The government responded that it was constitutional under either the Copyright Clause or the Commerce Clause. The district court denied the motion to dismiss. The constitutionality of the anti-bootlegging statute appears to be a question of first impression in the nation. For the reasons that follow, and in the limited circumstances of this case, we reject Moghadam's constitutional challenge, and therefore affirm Moghadam's conviction.

I. BACKGROUND ON THE ANTI-BOOTLEGGING STATUTE

A brief overview of the history of statutory protection for music and musical performances is in order. Musicians or performers may enjoy copyright or copyright-like protection in three things, which are important to keep distinct. First, a musical composition itself has been protected by statute under copyright law since 1831. *See* 17 U.S.C. § 102(a)(2) (providing that "musical works, including any accompanying words" are protectable subject matter); Todd D. Patterson, Comment, The Uruguay

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[1] In pleading guilty, Moghadam duly preserved his right to appeal.

Round's Anti-Bootlegging Provision: A Victory for Musical Artists and Recording Companies, 15 Wis. Int'l L.J. 371, 380-83 (1997). However, for most of the nation's history, sound recordings were not protected. *See Patterson, supra,* at 380 ("The important distinction between the first copyright statutes of 1831 and what would ultimately become the Sound Recording Act of 1971 is that these early statutes protected the reproduction of musical notation rather than the reproduction of actual sound."). In 1971, Congress extended copyright protection to sound recordings. Sound Recording Act of 1971, Pub.L. No. 92-140, 85 Stat. 391;[2] *see* also 17 U.S.C. § 102(a)(7) (including "sound recordings" in the list of copyrightable "works of authorship"). This meant that persons who made unauthorized reproductions of records or tapes, which is known as "piracy,"[3] could be prosecuted or face civil liability for copyright infringement. *See* 17 U.S.C. § 114 (defining the scope of exclusive rights of the holder of a copyright in sound recordings). The copyright law, especially as amended by further statutes,[4] went far toward

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[2] The entire copyright code was subsequently overhauled by the Copyright Act of 1976, Pub.L. No. 94-553, 90 Stat. 2541, but the new statute carried forward the substance of the Sound Recording Act of 1971.

[3] "Piracy," which refers to an unauthorized duplication of a performance already reduced to a sound recording and commercially released, is conceptually distinct from "bootlegging," which has been defined as the making of "an unauthorized copy of a commercially unreleased performance." *Dowling v. United States,* 473 U.S. 207, 209 n. 2, 105 S.Ct. 3127, 87 L.Ed.2d 152 (1985).

[4] *See Piracy and Counterfeiting Amendments Act of 1982,* Pub.L. No. 97-180, 96 Stat. 91 (codified at 18 U.S.C. §§ 2318-2319)

securing the rights of musicians and recording artists to receive fair benefit from their creative efforts.

However, following passage of the Sound Recording Act of 1971, a void still remained. No protection at the federal level extended directly to unrecorded live musical performances.[5] Therefore, a bootlegger could surreptitiously record a live musical performance and engage in unauthorized distribution of the recording or copies thereof, without having violated copyright law. This gap in copyright protection, exacerbated by the growing market for such bootleg copies, motivated Congress to enact the anti-bootlegging provision at issue in the instant case.

The anti-bootlegging statute grew out of the Agreement on Trade Related Aspects of Intellectual Property ("TRIPs"), which has been described as "the highest expression to date of binding intellectual property law in the international arena." David Nimmer, The End of

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(imposing criminal liability for trafficking in counterfeit labels attached to phonorecords); Record Rental Amendment of 1984, Pub.L. No. 98-450, 98 Stat. 1727 (codified at 17 U.S.C. §§ 109(b), 115(c)) (prohibiting rental of phonorecords to the public for commercial advantage); Audio Home Recording Act of 1992, Pub.L. No. 102-563, 106 Stat. 4237 (codified at 17 U.S.C. §§ 1001-1010) (implementing a royalty payment system and a serial copyright management system for digital audio recording); Digital Performance Rights in Sound Recordings Act of 1995, Pub.L. No. 104-39, 109 Stat. 336 (codified at scattered sections of 17 U.S.C.) (granting public performance rights for digital transmission of sound recordings).

[5] There were and still are, however, numerous examples of statutory protection for live musical performances at the state level. *See*, e.g., Fla. Stat. § 540.11(2)(a)(3).

Copyright, 48 Vand. L.Rev. 1385, 1391-92 (1995) [hereinafter Nimmer, The End of Copyright]. TRIPs became law by operation of the Uruguay Round Agreements Act ("URAA"), Pub.L. No. 103-465, 108 Stat. 4809 (1994), a comprehensive act dealing with matters of international trade. 18 U.S.C. § 2319A (which corresponds to § 513 of the URAA, 108 Stat. at 4975), provides, in pertinent part:

> (a) Whoever, without the consent of the performer or performers involved, knowingly and for purposes of commercial advantage or private financial gain –
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> (1) fixes the sound or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation;
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> (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance; or
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> (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States;
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> shall be imprisoned . . . or fined . . . or both. . . .

The URAA also enacted a similar provision establishing civil liability for the same conduct (but omitting the commercial advantage or private financial gain requirement). *See* 17 U.S.C. § 1101 (corresponding to § 512 of the URAA, 108 Stat. at 4974). There is little legislative history dealing with either provision because the URAA was

rushed through Congress on fast-track procedures. However, what little legislative history exists tends to suggest that Congress viewed the anti-bootlegging provisions as enacted pursuant to its Copyright Clause authority. *See* 140 Cong. Rec. H11441, H11457 (daily ed. Nov. 29, 1994) (statement of Rep. Hughes) ("There are a number of changes in copyright that will advance our interests in the area of bootlegging, which is going to basically protect our country.").

The rights created by the anti-bootlegging provisions in URAA are actually hybrid rights that in some ways resemble the protections of copyright law but in other ways are distinct from them. *See* 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8E.03[B][1], at 8E-16 [hereinafter Nimmer on Copyright] ("The unfixed musical performances protected under [URAA] are accorded something approximating, but not equaling, copyright protection."). For example, although the civil provision is incorporated into Title 17 of the United States Code and borrows the remedies that apply to copyright infringement, neither the civil nor the criminal provision meshes with the overall structure of the copyright code. *See Patterson, supra,* at 410-12. Congress could have amended 17 U.S.C. § 102 to include live musical performances in the list of protectable subject matter, but it did not do so. Likewise, it is unclear whether longstanding concepts generally applicable to copyright law such as fair use, *see* 17 U.S.C. § 107, the work-for-hire doctrine, limited duration, *see* 17 U.S.C. § 302, and the statute of limitations, 17 U.S.C. § 507(b), carry over to the anti-bootlegging provisions. *See* 3 Nimmer on Copyright, *supra,* § 8E.03[B][2][b], at 8E-13 to 23; *see* also Susan M.

Deas, Jazzing up the Copyright Act? Resolving the Uncertainties of the United States Anti-Bootlegging Law, 20 Hastings Comm. & Ent. L.J. 567, 599-623 (1998) (providing detailed treatment of the host of interpretive problems associated with the anti-bootlegging statute); Nimmer, The End of Copyright, *supra,* at 1399 ("The provision of the law is so simple . . . and the language that Congress legislated so sparse, that most questions one could ask are simply not addressed in its implementation."). Finally, in contrast to the six exclusive rights of a copyright owner spelled out in 17 U.S.C. § 106, it appears that the only exclusive right created by the anti-bootlegging statute is to record and/or re-communicate one's performance.[6] For all of these reasons, the protections that the anti-bootlegging statutes confer on musicians are best described as "quasi-copyright" or sui generis protections.

II. WHETHER THE ANTI-BOOTLEGGING STATUTE CAN BE SUSTAINED UNDER THE COPYRIGHT CLAUSE OF THE CONSTITUTION

Our analysis of the constitutionality of § 2319A begins with the Copyright Clause of the United States Constitution. By that Clause, Congress is empowered "[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors

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[6] We raise these complexities only to differentiate between this statute and pure copyright provisions. Because none of them is implicated by the instant case and Moghadam's conduct falls squarely within the anti-bootlegging statute, we need not speculate as to the appropriate resolution of these questions.

the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.[7] This positive grant of legislative authority includes several limitations. *See, e.g., Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991) (holding that the word "Writings" in the Copyright Clause allows Congress to extend protection only to works of authorship that are original). Of these limitations, Moghadam has relied in the instant case only on the concept of "fixation" which is said to be embedded in the term "Writings."

The concept of fixation suggests that works are not copyrightable unless reduced to some tangible form. "If the word 'writings' is to be given any meaning whatsoever, it must, at the very least, denote some material form, capable of identification and having a more or less permanent endurance." 1 Nimmer on Copyright, *supra*, § 1.08[C][2], at 1-66.30 (internal quotation marks omitted); *see also Goldstein v. California*, 412 U.S. 546, 561, 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973) ("[W]ritings . . . may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor."). Of course, the term "Writings" has been interpreted so broadly as to include much more than writings in the literal sense, or the lay definition of the word.[8] *See* 17 U.S.C. § 102(a)(4)

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[7] The word "Discoveries" is thought to refer to the counterpart area of patent law. *See* 1 Nimmer on Copyright, *supra*, § 1.08, at 1-66.25 n. 1.

[8] Rejecting the notion that the Constitution "embalms inflexibly the habits of 1789," Judge Learned Hand wrote that the Copyright Clause's "grants of power to Congress comprise not only what was then known, but what the ingenuity of men

(pantomimes and choreographic works); *Id.* § 102(a)(6) (motion pictures and other audiovisual works); *Id.* § 102(a)(7) (sound recordings); 1 Nimmer on Copyright, *supra*, § 1.08[B], at 1-66.25-26. In fact, since a sound recording qualifies as a "Writing" in the constitutional sense, *Shaab v. Kleindienst*, 345 F.Supp. 589, 590 (D.D.C.1972) (per curiam), "it is now clear that a writing may be perceptible either visually or aurally," 1 Nimmer on Copyright, *supra*, § 1.08[B], at 1-66.27. But the fixation requirement seems to have persisted through this expansion. Thus, although in the modern era the term "Writings" allows Congress to extend copyright protection to a great many things, those things have always involved some fixed, tangible and durable form. *See Goldstein*, 412 U.S. at 561, 93 S.Ct. 2303 ("[W]ritings . . . may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor."); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58, 4 S.Ct. 279, 28 L.Ed. 349 (1884) (defining "Writings" as "all forms of writing, printing, engraving, etching, etc., by which the ideas of the mind of the author are given visible expression").

Moghadam argues that a live performance, by definition, has not been reduced to a tangible form or fixed as of the time of the performance. *See* Nimmer, The End of

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should devise thereafter. Of course, the new subject matter must have some relation to the grant, but we interpret by the general practice of civilized people in similar fields, for it is not a straitjacket but a charter for a living people." *Reiss v. National Quotation Bureau*, 276 F. 717, 719 (S.D.N.Y.1921).

Copyright, *supra*, at 1409 ("[N]o respectable interpretation of the word 'writings' embraces an untaped performance of someone singing at Carnegie Hall."); Susan M. Deas, Jazzing up the Copyright Act? Resolving the Uncertainties of the United States Anti-Bootlegging Law, 20 Hastings Comm. & Ent. L.J. 567, 570 (1998) ("The most obvious constitutional departure found in the [anti-bootlegging law] is how [it] extends protection to unfixed material under the authority of a congressional enactment."). Moghadam argues that, but for the bootlegger's decision to record, a live performance is fleeting and evanescent.

Because we affirm the conviction in the intstant case on the basis of analternatiev source of Congressional power, we decline to decide in this case whether the fixation concept of Copyright Clause can be expeanded so as to encompass live performances that are merely capable of being reduced to tangible form, but have not been.[9] For purposes of this case, we assume arguendo, without deciding, that the above described problems with the fixation requirement would preclude the use of the Copyright Clause as a source of Congressional power for the anti-bootlegging statute.

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[9] We note that the anti-bootlegging statute may be faced with another constitutional problem under the Copyright Clause. The Clause allows Congress to extend protection to authors only for "Limited Times." The protection afforded to live performances by § 2319A, however, contains no express time limitation and would arguably persist indefinitely. However, Moghadam has not preserved this argument, *see* infra, and we decline to address the argument in light of our disposition of this case.

III. WHETHER THE ANTI-BOOTLEGGING STATUTE CAN BE SUSTAINED UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION

The government contends, however, that the anti-bootlegging statute is permissible legislation under Congress's Commerce Clause power.[10] Congress has the legislative authority "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause empowers Congress to legislate regarding three things: (i) the use of channels of interstate commerce; (ii) instrumentalities and persons or things in interstate commerce; and (iii) intrastate activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59, 115 S.Ct. 1624, 1629-30, 131 L.Ed.2d 626 (1995). Our analysis here focuses on the third category of appropriate legislation. The applicable test is "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Id.* at 557, 115 S.Ct. at 1629. To survive Commerce Clause scrutiny, § 2319A " 'must bear more than a generic relationship several steps removed from interstate commerce, and it must be a relationship

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[10] Congress's failure to cite the Commerce Clause as grounds for § 2319A does not eliminate the possibility that the Commerce Clause can sustain this legislation. "[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise," *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S.Ct. 421, 92 L.Ed. 596 (1948), and "[i]n exercising the power of judicial review," we look only at "the actual powers of the national government," *Timmer v. Michigan Dept. of Commerce*, 104 F.3d 833, 839 (6th Cir. 1997) (emphasis added).

that is apparent, not creatively inferred.' " *United States v. Wright*, 117 F.3d 1265, 1270 (11th Cir.1997) (quoting *United States v. Kenney*, 91 F.3d 884, 888 (7th Cir.1996)), vacated in part on other grounds, 133 F.3d 1412 (11th Cir.), cert. denied, ___ U.S. ___, 119 S.Ct. 217, 142 L.Ed.2d 178 (1998).

Because Congress thought it was acting under the Copyright Clause, predictably there are no legislative findings in the record regarding the effect of bootlegging of live musical performances on interstate or foreign commerce. Such findings are normally helpful to a court in finding an interstate commerce nexus. *See Cheffer v. Reno*, 55 F.3d 1517, 1520 (11th Cir. 1995) (upholding statute regarding freedom of access to abortion clinics under the Commerce Clause and relying on a plethora of specific legislative findings in the record regarding the effect of violence and physical obstruction on commerce in reproductive health services); see also *United States v. Viscome*, 144 F.3d 1365, 1371 (11th Cir.) (holding that "explicit findings that the proscribed activity in issue substantially affected interstate commerce" are accorded "substantial deference"), cert. denied, ___ U.S. ___, 119 S.Ct. 362, 142 L.Ed.2d 299 (1998). However, the lack of such findings does not rule out the Commerce Clause as a possible source of legislative authority applicable to the statute under challenge. *Wright*, 117 F.3d at 1269. In *Lopez*, the Court said that although "congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye," *Lopez*, 514 U.S. at 563, 115 S.Ct. at 1632, "Congress normally is not required to make [such] formal findings," *Id.* at 562, 115 S.Ct. at 1631.

Section 2319A also contains no jurisdictional element as is commonly found in criminal statutes passed under authority of the Commerce Clause. That is, there is no requirement that, for example, the bootleg copies or phonorecords have traveled in interstate or foreign commerce. Just as legislative findings can help fortify a statute against Commerce Clause scrutiny, a jurisdictional element is helpful because it ensures that each individual case will necessarily satisfy the required interstate commerce nexus. *Lopez*, 514 U.S. at 562, 115 S.Ct. at 1631 (noting that express jurisdictional elements "limit [a statute's] reach to a discrete set of [offenses] that additionally have an explicit connection with or effect on interstate commerce"). However, the absence of such a jurisdictional element connecting the offense to interstate or foreign commerce does not necessarily mean the Commerce Clause cannot serve as authority. *Wright*, 117 F.3d at 1269; *see also Viscome*, 144 F.3d at 1371 & n. 12 (noting that even though Congress had recently amended statute criminalizing possession of machineguns to include jurisdictional element, that did not necessarily mean previous version of statute without jurisdictional element exceeded Commerce Clause authority); *United States v. Olin Corp.*, 107 F.3d 1506, 1510 (11th Cir.1997) ("[A]lthough Congress did not include in CERCLA either legislative findings or a jurisdictional element, the statute remains valid as applied in this case because it regulates a class of activities that substantially affects interstate commerce."). The absence of such a jurisdictional element simply means that "courts must determine independently whether the statute regulates 'activities that arise out of or are connected with a commercial transaction, which

viewed in the aggregate, substantially affect[ ] interstate commerce.' " *Olin Corp.*, 107 F.3d at 1509 (quoting *Lopez*, 514 U.S. at 561, 115 S.Ct. at 1631).

Section 2319A clearly prohibits conduct that has a substantial effect on both commerce between the several states and commerce with foreign nations. The link between bootleg compact discs and interstate commerce and commerce with foreign nations is self-evident. For example, one of the elements of the offense is that the activity must have been done "for purposes of commercial advantage or private financial gain." 18 U.S.C. § 2319A(a). If bootlegging is done for financial gain, it necessarily is intertwined with commerce. Bootleggers depress the legitimate markets because demand is satisfied through unauthorized channels. *Cf. Wickard v. Filburn*, 317 U.S. 111, 127-28, 63 S.Ct. 82, 87 L.Ed. 122 (1942) (finding an interstate commerce nexus sufficient to support federally mandated wheat growing limits in the fact that farmers who grew wheat for home consumption would not buy wheat in the normal market, thereby depressing commerce). Generally speaking, performing artists who attract bootleggers are those who are sufficiently popular that their appeal crosses state or national lines. The very reason Congress prohibited this conduct is because of the deleterious economic effect on the recording industry.[11] The specific context in which § 2319A was

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[11] The government's brief in the instant case traced the impact that bootlegging of live performances has on commerce:

> The trafficking in bootleg sound recordings results in unjust enrichment of persons who unfairly appropriate the intellectual property and potential

enacted involved a treaty with foreign nations, called for by the World Trade Organization, whose purpose was to ensure uniform recognition and treatment of intellectual property in international commerce. The context reveals that the focus of Congress was on interstate and international commerce.

Moreover, the type of conduct that Congress intended to regulate by passing the anti-bootlegging statute is by its very nature economic activity, which distinguishes the statute from the Gun-Free School Zones Act struck down in *Lopez*, which in criminalizing the possession of handguns within 1000 feet of a school, "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561, 115 S.Ct. at 1630-31. *See also* Nimmer, The End of Copyright, *supra*, at 1410 n. 155 ("Although [*Lopez*] demonstrates that Congress's power under the Commerce Clause is not infinite, it does not remotely threaten the viability of this trade law, given how close to the core of economic activity the Uruguay

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> profits of sound recording companies and artists. The regulated activity thus substantially affects the profitability and viability of the aggregate sound recording industry. In other words, trafficking in bootleg sound recordings substantially affects and threatens the continuous interstate commercial activity generated by the artists and sound recording companies, which incur significant risks in the nationwide marketing of the fixed sounds of live musical performances.

Government's Initial Brief at 15.

Round Agreements lie."). We hold that the anti-bootlegging statute has a sufficient connection to interstate and foreign commerce to meet the *Lopez* test.

The more difficult question in this case is whether Congress can use its Commerce Clause power to avoid the limitations that might prevent it from passing the same legislation under the Copyright Clause. As noted above, we assume arguendo that the Copyright Clause could not sustain this legislation because live performances, being unfixed, are not encompassed by the term "Writings" which includes a fixation requirement. The government argues that the anti-bootlegging conviction in this case can be sustained under the Commerce Clause. We turn now to this issue.

In general, the various grants of legislative authority contained in the Constitution stand alone and must be independently analyzed. In other words, each of the powers of Congress is alternative to all of the other powers, and what cannot be done under one of them may very well be doable under another. Perhaps the most prominent example of this principle is *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964). There, the Supreme Court considered the constitutionality of the public accommodation provisions of the Civil Rights Act of 1964. The earlier *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), had declared unconstitutional similar provisions of the Civil Rights Act of 1875 because they regulated private conduct beyond the scope of the legislative authority granted by § 5 of the Fourteenth Amendment. Yet, the *Heart of Atlanta Motel* Court held, the Civil Rights Act of 1964 was

1964 was predicated on the Commerce Clause and possessed sufficient connection to interstate commerce. *See Heart of Atlanta Motel*, 379 U.S. at 250, 85 S.Ct. 348. The Court's reasoning illustrates that, as a general matter, the fact that legislation reaches beyond the limits of one grant of legislative power has no bearing on whether it can be sustained under another. *Id.* (concluding that Congress possessed ample power pursuant to the Commerce Clause, and "we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone"); *see also South Dakota v. Dole*, 483 U.S. 203, 207, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) (holding that pursuant to the Spending Clause, U.S. Const. art. I, § 8, cl. 1, Congress may condition its appropriation of money to the states on their agreement to impose restrictions that would be beyond Congress's constitutional legislative authority to enact directly).

This general approach has been applied in a context involving the Copyright Clause and the Commerce Clause as alternative sources of Congressional power. The Trade-Mark Cases, 100 U.S. (Otto) 82, 25 L.Ed. 550 (1879), involved an 1876 Congressional enactment of a primitive sort of trademark protection ("1876A Act"), long before the modern-day Lanham Act. Act of Aug. 14, 1876, 19 Stat. 141. This statute conferred protection on, and prohibited the counterfeiting of, various types of trademarks. The defendants were criminally prosecuted

under the 1876 Act for trying to pass off imitation beverage products as brand-name by imitating famous trademarks of well-known beverage makers. The defendants challenged the constitutionality of the 1876 Act, arguing that Congress did not have legislative authority to enact it. As in the instant case, the government responded by proffering the Copyright Clause and Commerce Clause as alternative possible bases of legislative authority.

Apparently, just as was the case with the anti-bootlegging statute, Congress labored under the impression that it was acting pursuant to its Copyright Clause power. The Trade-Mark Cases, 100 U.S. (10 Otto) at 93 ("[U]ntil a critical examination of the subject in the courts became necessary, it was mainly if not wholly to [the Copyright C]lause that the advocates of the law looked for its support."). Nevertheless, the Supreme Court held that the Copyright Clause could not sustain the 1876 Act because "[t]he ordinary trade-mark has no necessary relation to invention or discovery," which were the hallmarks of protectable subject matter under the Copyright Clause. The Trade-Mark Cases, 100 U.S. (10 Otto) at 94. Trademarks are inherently commercial; the concept behind the 1876 Act (and modern trademark law) was not to encourage intellectual and artistic development, but rather to protect businesses from predatory behavior in the marketplace. *See id.* ("[A trademark] requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation."). These characteristics made trademarks substantively different from the material the Congress was constitutionally able to protect pursuant to the Copyright Clause. A trademark could be registered under the 1876 Act even without any

showing of originality. "While such legislation may be judicious aid . . . and may be within the competency of legislatures whose general powers embrace that class of subjects," the Court held, "we are unable to see any such power in the constitutional provision concerning authors and inventors, and their writings and discoveries." *Id.*

The Court next considered whether Congress could enact the 1876 Act under the Commerce Clause. The Court summarized the government's argument at the outset as that "the trade-mark is . . . a useful and valuable aid or instrument of commerce, and its regulation by virtue of the [Commerce C]lause belongs to Congress." *Id.* 100 U.S. (10 Otto) at 95. The Court appeared receptive to this argument. However, it must be remembered that the Trade-Mark Cases predated the New Deal-era expansion of the Commerce Clause. In the nineteenth century, "there still remain[ed] a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, [was] beyond the control of Congress." *Id.* 100 U.S. (10 Otto) at 96. Unfortunately (but understandably, since Congress had labored under the impression that it was authorized to enact the 1876 Act under its Copyright Clause power), there was no jurisdictional-type element in the 1876 Act to ensure that trademark protection would extend only insofar as related to interstate commerce. *See id.* 100 U.S. (10 Otto) at 97 ("Here is no requirement that [a person receiving trademark protection] shall be engaged in the kind of commerce which Congress is authorized to regulate."). Consequently, the Court ultimately struck down the 1876 Act as not sustainable under either the Copyright Clause or the Commerce Clause.

Although the 1876 Act did not survive due to the restrictive view of the Commerce Clause prevailing at that time, the Supreme Court's analysis in the Trade-Mark Cases stands for the proposition that legislation which would not be permitted under the Copyright Clause could nonetheless be permitted under the Commerce Clause, provided that the independent requirements of the latter are met. Of course, we have already held that the anti-bootlegging statute satisfies the "substantial effects" test of post-*Lopez* Commerce Clause jurisprudence. The analysis in the Trade-Mark Cases tends to refute the argument that Congress is automatically forbidden from extending protection under some other grant of legislative authority to works that may not be constitutionally protectable under the Copyright Clause. Indeed, modern trademark law is built entirely on the Commerce Clause, *see, e.g., Jellibeans, Inc. v. Skating Clubs of Ga., Inc.*, 716 F.2d 833, 838 (11th Cir.1983), and we have found no case which suggests that trademark law's conferral of protection on unoriginal works somehow runs afoul of the Copyright Clause. See Michael B. Gerdes, Comment, Getting Beyond Constitutionally Mandated Originality as a Prerequisite for Federal Copyright Protection, 24 Ariz. St. L.J. 1461, 1471 (1992) ("The constitutionality of current federal trademark legislation . . . supports the conclusion that the Copyright Clause does not limit Congress's Commerce Clause power to grant copyright-like protection.").

A similar analysis was adopted by the Second Circuit in *Authors League of America, Inc. v. Oman*, 790 F.2d 220 (2d Cir.1986). There, the issue was the constitutionality of 17 U.S.C. § 601, a now-expired provision designed to protect

the domestic book publishing and printing industries by restricting the importation of copyrighted, nondramatic literary works which were published abroad. The plaintiffs argued, inter alia, that this statute went beyond Congress's legislative power under the Copyright Clause because of the introductory language in the Clause which restricts such legislation to that which helps to "promote the Progress of . . . useful Arts." Section 601, the plaintiffs argued, was essentially protectionist economic legislation that did not serve that purpose. The Second Circuit responded to this argument as follows:

> What plaintiffs' argument fails to acknowledge, however, is that the copyright clause is not the only constitutional source of congressional power that could justify [§ 601]. In our view, denial of copyright protection to certain foreign-manufactured works is clearly justified as an exercise of the legislature's power to regulate commerce with foreign nations.

790 F.2d at 224. The *Authors League* analysis suggests that the Commerce Clause may be used to accomplish that which the Copyright Clause may not allow.

On the other hand, it might be argued that some of the grants of legislative authority in Article I, § 8 contain significant limitations that can be said to represent the Framers' judgment that Congress should be affirmatively prohibited from passing certain types of legislation, no matter under which provision. The Supreme Court touched on such a situation in *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 102 S.Ct. 1169, 71 L.Ed.2d 335 (1982). Congress had enacted a statute that purported to alter a pending bankruptcy case by requiring the

debtor railroad company's bankruptcy estate to pay $75 million to the company's former employees. This statute directly clashed with the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, which provides that Congress is empowered to pass "uniform" bankruptcy laws, because the law targeted a particular situation and was anything but uniform. The Court quickly brushed off the possibility that the legislation could nevertheless be sustained under the Commerce Clause (which contains no uniformity requirement), stating that "if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws." *Id.* at 468-69, 102 S.Ct. 1169. In *Railway Labor Executives*, the statute that Congress passed directly conflicted with the uniformity requirement of the Bankruptcy Clause. Cf. Paul J. Heald, The Vices of Originality, 1991 Sup.Ct. Rev. 143, 168-75 (arguing that Congress would not be able to circumvent the originality requirement inherent in the term "Writings" in the Copyright Clause by passing a statute under the Commerce Clause which extended copyright-like protection to unoriginal works).

We note that there is some tension between the former line of cases (*Heart of Atlanta*, the *Trade-Mark Cases* and *Authors League*) and the *Railway Labor Executives* case. The former cases suggest that in some circumstances the Commerce Clause can be used by Congress to accomplish something that the Copyright Clause might not allow. But the *Railway Labor Executives* case suggests that in some circumstances the Commerce Clause cannot be used to eradicate a limitation placed upon Congressional power

in another grant of power. For purposes of the instant case, we resolve this tension in the following manner. In resolving this tension and in reaching our conclusion in this case, we undertake a circumscribed analysis, deciding only what is necessary to decide this case, and we reach a narrow conclusion. First, as described above, we hold the anti-bootlegging statute satisfies the "substantial effects" test of the post-*Lopez* Commerce Clause jurisprudence. Second, following the former line of cases (*Heart of Atlanta*, the *Trade-Mark Cases* and *Authors League*), we hold that in some circumstances the Commerce Clause indeed may be used to accomplish that which may not have been permissible under the Copyright Clause. We hold that the instant case is one such circumstance in which the Commerce Clause may be thus used. It is at this point that we must resolve the tension with *Railway Labor Executives*.

Resolving this tension, we take as a given that there are some circumstances, as illustrated by *Railway Labor Executives*, in which the Commerce Clause cannot be used by Congress to eradicate a limitation placed upon Congress in another grant of power.[12] For the reasons that follow, we hold that the instant case is not one such circumstance. We hold that the Copyright Clause does not envision that Congress is positively forbidden from

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[12] We assume arguendo, without deciding, that the Commerce Clause could not be used to avoid a limitation in the Copyright Clause if the particular use of the Commerce Clause (e.g., the anti-bootlegging statute) were fundamentally inconsistent with the particular limitation in the Copyright Clause (e.g., the fixation requirement).

extending copyright-like protection under other constitutional clauses, such as the Commerce Clause, to works of authorship that may not meet the fixation requirement inherent in the term "Writings." The grant itself is stated in positive terms, and does not imply any negative pregnant that suggests that the term "Writings" operates as a ceiling on Congress' ability to legislate pursuant to other grants. Extending quasi-copyright protection to unfixed live musical performances is in no way inconsistent with the Copyright Clause, even if that Clause itself does not directly authorize such protection. Quite the contrary, extending such protection actually complements and is in harmony with the existing scheme that Congress has set up under the Copyright Clause.[13] A live musical performance clearly satisfies the originality requirement. Extending quasi-copyright protection also furthers the purpose of the Copyright Clause to promote the progress of the useful arts by securing some exclusive rights to the creative author. Finally, with respect to the fixation requirement, upon which this opinion focuses, although a live musical performance may not have been fixed, or reduced to tangible form, as of the time the bootleg copy was made, it certainly was subject to having been thus fixed. Our conclusion that extending copyright-like protection in the instant case is not fundamentally inconsistent with the fixation requirement of the Copyright Clause is bolstered by an example from the prior copyright law. If a live performance is broadcast, e.g., by radio

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[13] In light of our disposition of this case, we need not address the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, as a possible source of Congressional power.

or television, and simultaneously recorded by the performer, any unauthorized recording by a person receiving the broadcast constitutes copyright infringement of the sound recording or motion picture, notwithstanding that the infringer actually copied the live performance directly, and not the fixation thereof. This result is based upon the last sentence of the definition of "fixed" in 17 U.S.C. § 101. That last sentence provides: "A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission." This definition creates a legal fiction that the simultaneous fixation occurs before the transmission and the unauthorized recording. *See* H.R. Rep. 94-1476 at 52-53, reprinted in 1976 U.S.C.C.A.N. 5659, 5665-66; 1 Nimmer on Copyright, *supra*, § 1.08[C][2], at 1-66.32 ("It is as if one who was dictating live into a tape recorder were overheard and copied at the moment of dictation. At that moment, the material has become a 'writing,' even if copied simultaneously, rather than a moment later."). While we are aware that the constitutionality of this aspect of the statute has never been tested, the ease with which it has been incorporated into the prior copyright law suggests that fixation, as a constitutional concept, is something less than a rigid, inflexible barrier to Congressional power. Indeed, if a performer under the prior law could effectively protect a live musical performance, circumventing the fixation requirement, simply by the device of simultaneous recordation, the anti-bootlegging law seems to us like more of an incremental change than a constitutional breakthrough. Common sense does not indicate that extending copyright-like protection to a live

performance is fundamentally inconsistent with the Copyright Clause.

For the foregoing reasons, we conclude that extending copyright-like protection in the instant case is not fundamentally inconsistent with the fixation requirement of the Copyright Clause. By contrast, the nonuniform bankruptcy statute at issue in *Railway Labor Executives* was irreconcilably inconsistent with the uniformity requirement of the Bankruptcy Clause of the Constitution.[14]

We note that there is another limitation in the Copyright Clause that may be implicated by the anti-bootlegging statute: the "Limited Times" requirement that forbids Congress from conferring intellectual property rights of perpetual duration. *See Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 16-17, 7 L.Ed. 327, 333 (1829). On its face, the protection created by the anti-bootlegging statute is apparently perpetual and contains no express time limit; therefore phonorecords of live musical performances would presumably never fall into the public domain. *See* Nimmer, The End of Copyright, *supra*, at 1411 ("[T]he Caruso example of protecting a work from a century ago

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[14] Our holding is limited to the fixation requirement, and should not be taken as authority that the other various limitations in the Copyright Clause can be avoided by reference to the Commerce Clause. Compare Nimmer, The End of Copyright, *supra*, at 1413 (decrying that Congress may "jettison Feist" by analogy to the URAA because "[w]hy is a telephone book any further afield than a performance at Carnegie Hall?"), with *Gerdes*, *supra*, at 1461 (proposing that Congress legislatively overrule *Feist* and extend copyright protection to unoriginal works by relying on the Commerce Clause).

and for centuries into the future . . . is the antithesis of 'limited times.' "); *see also Goldstein v. California*, 412 U.S. 546, 560-61, 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973) (suggesting that a copyright of unlimited duration would have a tendency to inhibit the progress of the arts). However, because Moghadam has not challenged the constitutionality of § 2319A on this basis,[15] we decline to raise the issue sua sponte. Thus, we do not decide in this case whether extending copyright-like protection under the anti-bootlegging statute might be fundamentally inconsistent with the "Limited Times" requirement of the Copyright Clause, and we do not decide in this case whether the Commerce Clause can provide the source of Congressional power to sustain the application of the anti-bootlegging statute in some other case in which such an argument is preserved. We reserve those issues for another day.

Summarizing our narrow holding in this case, we assume arguendo, without deciding, that the anti-bootlegging statute cannot satisfy the fixation requirement of the Copyright Clause; we hold that the statute satisfies the "substantial effects" test of the post-*Lopez* Commerce

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[15] Moghadam did not make this argument in the district court or in his brief on appeal. He fleetingly mentions the "Limited Times" requirement for the first time in his reply brief on appeal, and even then does not argue that extending copyright-like protection in this case pursuant to the Commerce Clause would be prohibited by an inconsistency with the "Limited Times" requirement of the Copyright Clause. The government has not had any opportunity to present a defense to such an argument, and it would be unfair to entertain the argument at this late date.

Clause jurisprudence; we hold that the Commerce Clause can provide the source of Congressional power in this case because the extension of copyright-like protection here is not fundamentally inconsistent with the fixation requirement of the Copyright Clause;[16] and thus under the circumstances of this case,[17] we reject Moghadam's constitutional challenge to his conviction.

IV. CONCLUSION

For the foregoing resons,[18] the judgment of the district court is AFFIRMED.

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[16] Because we find no such inconsistency, we need not decide the consequences if there were inconsistency. *See* note 12, *supra*.

[17] As noted above, Moghadam has waived any constitutional challenge based on the "Limited Times" requirement of the Copyright Clause, and thus our holding in this case is further narrowed by the fact that we do not address potential arguments based on the "Limited Times" requirement.

[18] We reject Moghadam's other arguments on appeal without need for discussion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2180

(Filed Aug 27, 1999)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALI MOGHADAM,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: ANDERSON, Chief Judge, HULL, Circuit Judge, and HAND* Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled

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*Honorable William B. Hand, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ CHIEF JUDGE
